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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 95-88888-cgm

4 Adv. Case No. 08-01789-smb

5 - x

6 In the Matter of:

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8 THE BANKRUPTCY LINK,

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10 Debtor.

11 - x

12 SECURITIES INVESTOR PROTECTION CORPORATION,

13 Plaintiff,

14 v.

15 BERNARD MADOFF INVESTMENT SECURITIES,

16 Defendants.

17 - x

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1 United States Bankruptcy Court
2 One Bowling Green
3 New York, NY 10004

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5 January 22, 2020

6 2:05 PM

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21 BEFORE :

22 HON STUART BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: MATTHEW

Page 3

1 HEARING re Trustee's Motion for Fees and Expenses Pursuant
2 to Fed. R. Civ. P. 37(A)(5)(B)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Madoff?

3 MR. SHIFRIN: Good afternoon, Your Honor. Max
4 Shifrin on behalf of the Trustee. I'm here with my
5 colleague, Nick Cremona.

6 We are here on the Trustee's motion pursuant to
7 Federal Rule of Civil Procedure 37(a)(5)(B), which entitles
8 a party, successfully opposing a motion to compel, its
9 reasonable attorney's fees, unless the movant can
10 demonstrate that the motion was substantially justified or
11 the award of fees would be unjust.

12 Now, the underlying motion here, Your Honor, was
13 Ms. Chaitman's third motion to compel, which Judge Maas
14 unequivocally denied in his January 2019 order, in which
15 this Court unequivocally affirmed in its August 2019 order.

16 Under the rule, the burden of establishing
17 substantial justification or the presence of unjust
18 circumstances was Ms. Chaitman's to carry, and I submit to
19 this Court here today, Your Honor, that she has failed to
20 carry that in her papers.

21 Now, I'm happy to go into the arguments that we've
22 laid out in our brief, Your Honor, but given that this is
23 Ms. Chaitman's, or Mr. Dexter's opportunity to be heard, and
24 given that it's their burden to establish substantial
25 justification or unjust circumstances, I'm happy to cede the

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1 floor, if the Court prefers, or I'm happy to address any
2 issues that the Court has.

3 THE COURT: I do have one question. Where do you
4 prove the reasonableness of your fees, in terms of the
5 billing rate?

6 MR. SHIFRIN: Well, with respect to the rates,
7 first of all I would say, Your Honor, if we're talking about
8 rates, that means we're -- we've established that the motion
9 was not substantially justified.

10 THE COURT: I understand.

11 MR. SHIFRIN: Okay. Understood. Well, I think
12 our rates are established first and foremost by the fact
13 that this Court has some insight into our fee structure over
14 the last several years. Secondly, Your Honor, we cite
15 several cases that allude to and articulate the fees in the
16 Southern District that are reasonable for a variety of
17 levels. And I think that the fees that we've offered, for
18 my services, for my time fall well within the range of
19 reasonable fees.

20 Now, if we're talking about the rates and fees,
21 and if the Court deems the submissions in any way
22 inadequate, I think once we assume that the motion was not
23 substantially justified, that there are not, otherwise,
24 unreasonable circumstances that preclude an award of fees, I
25 think we can supplement the record with whatever else the

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1 Court needs to make that showing. But I do think that the
2 Court can take judicial notice of --

3 THE COURT: But don't you think that's the burden
4 on your motion? You're seeking fees, don't you have the
5 burden of proving reasonableness?

6 MR. SHIFRIN: Well, yeah, that's correct, Your
7 Honor, but it's a two-step inquiry. So the burden is on,
8 first and foremost, the moving party to show that the motion
9 was substantially justified, or that there are unjust
10 circumstances precluding an award of fees.

11 THE COURT: But --

12 MR. SHIFRIN: And once that happens --

13 THE COURT: -- you're proposing two motions, or
14 two submission.

15 MR. SHIFRIN: No, Your Honor.

16 THE COURT: I'm just saying don't you do it all at
17 once?

18 MR. SHIFRIN: No, I'm proposing, to the extent
19 that the Court deem the submissions, my declaration, the
20 exhibits, insufficient, that we be permitted to supplement
21 and cure whatever deficiency. I don't think that's a
22 separate motion, I think that's just a supplemental
23 submission.

24 But again, Your Honor, and if we're -- and I know
25 the Court recognizes this, if we're talking about fees, I

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1 think the threshold issue we have to address, first and
2 foremost, and the ruling that the Trustee wants more than
3 anything here, is a finding, expressed finding, that this
4 motion was not substantially justified in the slightest and
5 that there are no unjust circumstances precluding an award
6 of fees.

7 THE COURT: I think that the defendants, and Ms.
8 Chaitman has, yes, raised some other defenses, not just
9 submit substantial justification.

10 MR. SHIFRIN: Well --

11 THE COURT: For example, they argue that a good
12 portion of your fees were devoted to the appeal before me,
13 and they argue that you're not entitled to an award of fees
14 for the appeal. What's your response?

15 MR. SHIFRIN: Well, they said no case law, Your
16 Honor, that precludes an award of fees in this
17 circumstances. And, admittedly, Your Honor, there are no
18 cases that I have been able to find going the other way. I
19 think it's, ultimately, an open question.

20 I do think that in these circumstances, given the
21 way that the appellate process was structured, given the
22 conduct that the Trustee has extensively recounted, that
23 this Court and Judge Maas have now extensively recounted,
24 much of the conduct took place in this court. We were going
25 back and forth between this Court and Judge Maas for

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1 multiple years. And given the merits of the arguments that
2 were raised on appeal, as this Court said, the fundamental
3 premise of this appeal that I, emphasis, ordered the Trustee
4 to produce any documents, is wrong. And I think Your Honor
5 was being generous with that language. Not only was it
6 wrong, it was unambiguously wrong, and it was repeated over
7 and over and over again in a way that prejudiced the Trustee
8 for years, in a way that misled this Court, in a way that
9 really took this whole dispute off the rails. And it took
10 the Trustee several years to get it back on track.

11 And ultimately, Your Honor, Ms. Chaitman cite --
12 argues that the motion was necessary or the appeal, I'm
13 sorry, was necessary. The appeal was not necessary. Judge
14 Maas' findings were unequivocal. They didn't leave any
15 reasonable attorney with any opening to think, oh, I might
16 get a different result on appeal. And the arguments that
17 Ms. Chaitman lodged on appeal support that further.

18 So, Your Honor, if anyone needed the appeal, it
19 was the Trustee to definitively clear the record. And we're
20 very happy with the August 2019 order in that it, in our
21 view, adopted the Trustee's story, which we submitted in
22 opposition to Ms. Chaitman's appeal pretty much in total.

23 So I don't think it would be remotely unjust to
24 award the Trustee fees for opposing this appeal. And I
25 think one way to look at it is was the appeal substantially

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1 justified. I don't think it was. She could have just --
2 she could have accepted Judge Maas' order, which was the
3 whole purpose of going to a discovery arbitrator in the
4 first place. She didn't have to come back to this Court.

5 THE COURT: Okay. Thank you.

6 MR. DEXTER: Good afternoon, Your Honor. Greg
7 Dexter here with the Law Firm of Chaitman, LLP.

8 THE COURT: Good afternoon.

9 MR. DEXTER: I think the threshold issue is not
10 whether the motion was substantially justified, but whether
11 the motion was brought under 37(a) or 37(b). Because if it
12 was brought under 37(b), then there's no basis, and the
13 Trustee has certainly cited none, for this Court to award
14 attorney's fees under Rule 37(a).

15 THE COURT: Okay. So when was the motion brought?
16 Was it the September joint letter, was that the motion?

17 MR. DEXTER: That -- yes.

18 THE COURT: Okay. And you're saying that it was
19 only brought under 37(b)?

20 MR. DEXTER: Which is the only rule cited in the
21 joint letter. It was -- right, the motion was brought
22 because Ms. Chaitman understood, reasonably understood, and
23 now the Court has indicated that that was a
24 misunderstanding, that there were multiple court orders
25 requiring the Trustee to make production of trading records.

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1 And based on that noncompliance, as it was perceived, Ms.
2 Chaitman made a motion for sanctions.

3 THE COURT: And what were the sanctions that she
4 sought?

5 MR. DEXTER: The sanctions were the reasonable
6 attorney's fees that had been incurred, as well as the
7 production, or not production, but access to the BLMIS
8 database. Because at that point there was a multi-year
9 discovery dispute, Ms. Chaitman believed that there was
10 court orders requiring the Trustee to turn over records.

11 And as a solution to resolve this dispute and to
12 keep it out of court, Ms. Chaitman suggested, as part of the
13 (indiscernible) process that was in front of Judge Maas, can
14 we have a user name and password so we can get into the
15 BLMIS database. Because if you look at the emails that were
16 exchanged between Ms. Chaitman and Mr. Shifrin, Ms. Chaitman
17 thinks that they're running searches of Madoff third-party
18 account numbers, of financial institutions, broker/dealers.
19 And what they're actually running are searches of Madoff
20 bank account numbers in --

21 THE COURT: But isn't that what she asked him to
22 do?

23 MR. DEXTER: No, it was this colossal
24 misunderstanding between the parties. And this took several
25 months for them to resolve after, you know, several months

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1 to even get to the position where the Trustee first offered
2 access to the BLMIS database. And after -- at that time,
3 once this meet and confer process failed, as a solution,
4 which would have resolved all of this, and kept it out of
5 court --

6 THE COURT: Can I ask you a question, though? You
7 say that your motion was just made under 37(b). Is access
8 or production one of the sanctions provided for in 37(b)?

9 MR. DEXTER: The sanctions in 37(b) are
10 illustrative. The Court has broad discretion to enter any
11 sanction that it deems appropriate under 37(b).

12 THE COURT: Couldn't your motion be both though?
13 Both a motion to compel discovery on the theory that there
14 were at least two court orders directing discovery, and also
15 a motion for sanctions denying discovery -- based on the
16 failure to produce up to that point?

17 MR. DEXTER: If it were under all of that at a
18 minimum there would need to be a substantial percentage cut
19 in the fees that are awarded because of the 37(b) component.
20 37(a) was not cited. So conceivably can you bring a motion
21 under 37(a) and 37(b)? Yes.

22 THE COURT: Well, do you have to cite the rule in
23 order to bring the motion? In other words, I mean this
24 whole matter was litigated, at least before Judge Maas and
25 then before me, on the notion that it was a motion to

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1 compel. Judge Maas never specifically addressed, and I
2 would say implicitly denied, the motion for sanctions and
3 you didn't raise that in your opening brief on appeal.

4 MR. DEXTER: At a very minimum, the primary aspect
5 to the motion was a motion for sanctions under 37(b). The --

6 THE COURT: But can I ask you about that?

7 MR. DEXTER: Sure.

8 THE COURT: For the six years I've been involved
9 in this case, all I've been hearing from Ms. Chaitman is how
10 much money the Trustee has. So why do you make a motion for
11 sanctions to get some money, and not ask for preclusion or
12 some other remedy that would advance the litigation? You
13 think he's going to be affected, or that SIPC is going to be
14 affected if its got to pay Ms. Chaitman a few thousand
15 dollars?

16 MR. DEXTER: No. The purpose was not punitive,
17 the purpose is --

18 THE COURT: But isn't that what sanctions are for?

19 MR. DEXTER: No. 37(a) and 37(b) sanctions are
20 not punitive. It's --

21 THE COURT: Well, but wait a minute.

22 MR. DEXTER: -- deterrence and compensatory.

23 THE COURT: I understand that, but the sanction
24 itself is punitive. The compensation may be compensatory,
25 but the sanction is punitive, isn't it? They did a bad

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1 thing, they're basically in contempt of court, that's what
2 you're saying.

3 MR. DEXTER: It was -- Ms. Chaitman was coming to
4 this Court for years, she just wanted trading records. The
5 parties had a dispute, there was misunderstandings.

6 THE COURT: What was the misunderstanding?

7 MR. DEXTER: Well, if you look at the papers and
8 the factual record, it's barely worth recounting, because
9 it's so long here.

10 THE COURT: Well, that's why these fees are so
11 high.

12 MR. DEXTER: Well, not --

13 THE COURT: They spent 22 pages, in their
14 appellate brief telling me the history of this case.

15 MR. DEXTER: Okay. And we submitted a 25-page
16 declaration --

17 THE COURT: Well, that --

18 MR. DEXTER: -- that sets forth how we see the
19 facts. So --

20 THE COURT: But that's why it was -- that's why
21 this became so costly, because so many things happened.

22 MR. DEXTER: Most of that happened before the time
23 period in which they seek fees. And this would have all
24 been resolved if we had just had access to the BLMIS
25 database.

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1 THE COURT: So you get access to the BLMIS
2 database, you're sitting in front of the computer, what
3 search do you put in?

4 MR. DEXTER: What search do we put in? We would
5 put -- we suggested search terms which were --

6 THE COURT: But didn't they run them? I think you
7 got too many hits to make it worthwhile, right?

8 MR. DEXTER: They ran searches across the third-
9 party database, which was only documents they obtained from
10 subpoenas.

11 THE COURT: Maybe I'm wrong. I thought you ran
12 searches across the BLMIS database, the 30 million
13 documents.

14 MR. SHIFRIN: We did, Your Honor.

15 THE COURT: Yeah, that's what I thought.

16 MR. SHIFRIN: We did both databases. We did the
17 third-party database and then when we realized that there
18 was a misunderstanding, we did the BLMIS database.

19 THE COURT: That's what I thought. So you're
20 sitting there at the computer, you've got 30 million
21 documents on a screen, what search do you run?

22 MR. DEXTER: For institutions where Madoff did
23 trade. So for example, eventually we went to the data room
24 at -- when the appeal was -- or Queens Borough house when
25 the appeal was pending. And we found trading records, and

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1 we refer to this in our papers, that showed Madoff made
2 trades with Lehman Brothers, with Bear Stearns --

3 THE COURT: But that was never a secret. That was
4 in Dubinsky's report.

5 MR. DEXTER: Right. So those are search terms we
6 would have run, to answer your question.

7 THE COURT: But I thought you had gave those terms
8 to the Trustee and he came up with just too many hits to
9 make it practical.

10 MR. DEXTER: The factual record before the Court
11 is what it is. Ms. Chaitman is the only with first-party
12 knowledge, she submitted a declaration.

13 THE COURT: Well, she's here and he's seeking
14 sanctions against her, so -- and maybe you, I don't know.
15 But so don't tell me that you don't know, and she knows, but
16 she's not here, it's the motion. My recollection is, and I
17 reviewed the decisions, she gave search terms, like Fidelity
18 and Morgan Stanley and Lehman and things like that, and you
19 got millions of hits, which wasn't worthwhile. Isn't that
20 what happened?

21 MR. DEXTER: I think the searches were run on the
22 third-party database, which would be records from 2000 to
23 the present, which are records --

24 THE COURT: Would you agree then, that if those
25 searches from the September 2018 letter were run on the

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1 BLMIS database of 30 million documents, that your motion was
2 not substantially justified?

3 MR. DEXTER: If the search terms were already
4 read?

5 THE COURT: Yeah.

6 MR. DEXTER: As far as I know. I've never seen --

7 THE COURT: I'm just asking you the question,
8 because I think there's a dispute which can be cleared up by
9 just reviewing your record. But yeah, I don't think it --
10 in other words, I don't think your search is -- your motion
11 is substantially justified if you made a mistake about the
12 factual record.

13 MR. DEXTER: As far as I can tell, I mean, I've
14 never seen that production. And if that production was
15 made, it was only made after months of the Trustee making
16 the wrong search terms and promising access to the BLMIS
17 database.

18 THE COURT: But we're talking about what happened
19 as of September 2018 because that's the motion. If you want
20 to go back, I'll hear what their fees were with all the
21 other motions and make a determination maybe they're
22 entitled to more money. But what -- I'm looking at the
23 state of facts as of September 2018 when you make the
24 motion. And if up until that point they've run these
25 searches against the BLMIS database, the 30 million document

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1 database, how can your motion be substantially justified?

2 MR. DEXTER: If, at that point -- you mean if it's
3 a motion only under 37(a) and what we're seeking is --

4 THE COURT: Well, you're clearly seeking access to
5 documents. You may not cite 37(a), but as I said, Judge
6 Maas understood it to be a motion to compel, I understood it
7 to be a motion to compel, and on the appeal, you understood
8 it to be a motion to compel.

9 MR. DEXTER: It's a proper remedy under 37(b).

10 And if I could just refer to the Court --

11 THE COURT: Let me stop you right there.

12 MR. DEXTER: Sure.

13 THE COURT: I agree with you that you were seeking
14 two forms of relief in the September 2018 letter, which
15 we're calling the third motion. But the entire -- and I
16 think that the sanctions, as I said, and the motion to
17 compel, are intertwined, because the premise of both is that
18 there are trading records and in Ms. Chaitman's language,
19 "The Trustee has dishonestly refused to produce those
20 documents." In fact, at one point I think she says that she
21 believed that the Trustee was removing the bad documents
22 from the BLMIS database. If that's true, I don't know why
23 she wanted to search the database, but that's a different
24 story.

25 So it had both in it. But to tell me it wasn't a

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1 motion to compel at all, because you didn't happen to cite
2 the right rule, is just -- that wouldn't -- I just don't
3 agree with that.

4 MR. DEXTER: The thrust, the primary purpose of
5 the motion is that there were court orders. And that's why
6 it's 37(b). If I could just refer the Court to Judge Maas -
7 -

8 THE COURT: All right. Why don't we move on to
9 some of your other arguments?

10 I understand your argument that it wasn't a 37(a)
11 motion, it was a 37(b) motion. But go ahead.

12 MR. DEXTER: Even if there's a 37(a) component,
13 primarily it's 37(b). And Judge Maas, if I could just --
14 could I just recite it?

15 THE COURT: Sure. Go ahead.

16 MR. DEXTER: It's in our papers, but we think it's
17 important.

18 THE COURT: Go ahead.

19 MR. DEXTER: He summarized the dispute as follows:
20 "In brief, Defendants contend the Trustee has intentionally
21 and contumaciously failed to produce records. The Trustee
22 denied that he has failed to comply with any court orders."
23 So that's the primary crux of the dispute.

24 THE COURT: And what is the end result? What does
25 he say at the end? What's the motion he denies?

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1 MR. DEXTER: I don't have the full --

2 THE COURT: I think he denied the motion to
3 compel.

4 MR. DEXTER: But he's summarizing the dispute.

5 And then what Your Honor says, in August 2019, he says,
6 "Defendant's principle contention is that I ordered the
7 Trustee to produce all of the trading records by putting
8 them in the e-data room. The Trustee did not. The
9 discovery arbitrator ignored the Court's order and the
10 January 2nd, 2019 order must be reversed on this basis
11 alone."

12 THE COURT: Well --

13 MR. DEXTER: So the primary purpose was that there
14 are court orders, as we perceived them, requiring the
15 production of trading records.

16 THE COURT: So those orders were not the predicate
17 of the motion to compel -- or the portion of the motion
18 which sought to compel? That had nothing to do with it?

19 MR. DEXTER: I wouldn't say that had anything to
20 do with it, I would say that we thought there were court
21 orders, we wanted to resolve the dispute, we proposed a
22 solution on a way to resolve it. The Trustee would rather --
23 - didn't want to give us a username and password, instead
24 comes into court and now is seeking \$70,000 in fees for --
25 to not produce documents.

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1 THE COURT: Okay. Now, let me get to the -- on
2 appeal, which is about more than half of the expenses, are
3 you saying that the appeal had anything to do with the
4 sanctions portion of the motion?

5 MR. DEXTER: Yeah. I mean, they're seeking fees
6 for the appeal, right? So --

7 THE COURT: No, I understand, but is the appeal
8 from the portion of the motion seeking sanctions, which
9 Judge Maas never granted and you didn't raise?

10 MR. DEXTER: The appeal is from every aspect of
11 the January 2nd, 2019 order. And when Your Honor denied the
12 appeal Your Honor recognized that the primary purpose of the
13 appeal is that we thought Judge Maas didn't follow your
14 orders.

15 THE COURT: I know. I'm not arguing with you that
16 the predicate of your motion was your perception that there
17 were two orders entered. But that predicate was also -- but
18 those two orders were also the predicate of the motion to
19 compel, weren't they?

20 MR. DEXTER: Those orders were why we requested
21 court intervention, because they were court orders that we
22 thought required the production of documents.

23 THE COURT: But compelling is not a sanction.

24 MR. DEXTER: It could be under Rule 37(b), because
25 those sanctions, under Rule 37(b) --

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1 THE COURT: Have you cited a case to that
2 proposition?

3 MR. DEXTER: I think we cite Wright and Miller,
4 that it's -- we definitely cite an authority in our
5 opposition brief for that proposition.

6 THE COURT: Let me move on to something else. One
7 of your arguments is that, well, we're dealing with 37(a)
8 now, the fees and expenses that are recoverable under 37(a)
9 don't include an appeal.

10 MR. DEXTER: That's right.

11 THE COURT: Okay. And what is your authority for
12 that?

13 MR. DEXTER: Well, it's the American rule, Your
14 Honor. If you --

15 THE COURT: I know, but the rule changes the
16 American rule.

17 MR. DEXTER: Well, okay. So that's -- it's the
18 American rule. So unless there's an exception by statute --

19 THE COURT: Or rule.

20 MR. DEXTER: -- or rule, and it has to be express
21 and explicit for fee shifting. Okay? So the Baker Botts
22 case, the U.S. Supreme Court in the bankruptcy context, I
23 know the circumstances were a little bit different, held
24 that the American rule precluded an award of fees in the
25 bankruptcy context. And cases have relied on that authority

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1 when there is a sanction order entered and then someone --
2 the party sanctioned seeks reconsideration. The courts have
3 said that because of the American rule, 37 only says fees
4 can be awarded in connection with the motion. That doesn't
5 say that you can get fees if there's a reconsideration
6 motion of the Rule 37 order.

7 THE COURT: I found a case by Easterbrook that
8 said just that. He also said you can get the fees on
9 appeals.

10 MR. DEXTER: Okay. Well, he may be wrong about
11 that. But the Trustee hasn't cited that --

12 THE COURT: He's got a pretty good track record.
13 Yeah?

14 MR. DEXTER: I don't disagree with that, but the
15 Trustee hasn't cited that case.

16 THE COURT: All right. I'm going to give you an
17 opportunity to respond to that, because we found that case.

18 MR. DEXTER: Okay. What questions are outstanding
19 that I could answer for Your Honor?

20 THE COURT: Well, what are the -- some -- let me
21 see some of the other issues that you raised. I raised,
22 with the Trustee, the issue of whether or not he approved
23 the reasonableness of the billing rates. The fees I can
24 look at the time records and make a determination whether or
25 not they say what he did. Do you have any dispute with the

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1 billing rates?

2 MR. DEXTER: I don't have a dispute over Mr.
3 Shifrin's billing rate, but I do not think that the Trustee
4 has come even close to establishing his prima facie fee
5 application. I mean, he hasn't really done anything that he
6 has to do --

7 THE COURT: Okay. But there are two aspects to
8 that. There's the rate and the services, or the time. I
9 understand your general argument that the time is excessive
10 and that there are problems with the time records, but that
11 doesn't really go to his billing rate. So I'm just trying
12 to get that out of the case, if that's a dispute.

13 MR. DEXTER: With the ten percent reduction, the
14 billing rate's not something that we've challenged.

15 THE COURT: Okay. Okay. I just want to make sure
16 that that's out of this case.

17 MR. DEXTER: But, Your Honor, when you submit a
18 fee request, and I think this is where Your Honor was
19 questioning the Trustee about originally, is there are
20 certain things you have to put in a declaration. You don't
21 just say, here's Exhibit A, here's Exhibit B, here's Exhibit
22 C.

23 THE COURT: Usually, and I've done a lot of fee
24 applications and fee disputes, and written several fee
25 decisions, the services should be reflected in the time

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1 records and nothing else should be required. If there's a
2 problem with the time records, because of block billing, or
3 vague, or something like that, you know, you can -- the
4 Court has a lot of discretion, it can just do an across the
5 board deduction of some percentage. It doesn't have to look
6 at every single entry, if it gets the sense, for instance,
7 that there's a problem with the records.

8 Now, my question is really figured on the billing
9 rate. But it sounds like with the ten percent deduction,
10 the rate itself is not objectionable.

11 MR. DEXTER: I think it's a high rate. Do I think
12 it's --

13 THE COURT: You think it's a high rate?

14 MR. DEXTER: -- do I think it's unreasonable? No.

15 THE COURT: You should look at some of the rates
16 that are charged by attorneys in large firms in New York.

17 MR. DEXTER: I know what they are.

18 THE COURT: And they're all available on ECF.

19 MR. DEXTER: I know what they are, Your Honor.
20 But I'm not saying it's an unreasonable rate.

21 THE COURT: All right. Good.

22 Let me give you the name of that case I mentioned.
23 And I'll give you, what's today? The 22nd. What I'll do is
24 I'll give you a chance to respond, since I raised it, and
25 then I'll give the Trustee a chance to reply. Can you

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1 respond in seven days? It's just one case. It's three
2 pages, I think, or four pages.

3 MR. DEXTER: You want us to submit a three- or
4 four-page submission?

5 THE COURT: Well, I'll give you an opportunity.
6 You don't have to if you don't want, but I'm going to
7 consider this case --

8 MR. DEXTER: We can -- yes.

9 THE COURT: -- in response to your argument. And
10 by the way, you did cite a Ninth Circuit case specifically
11 that said that you can't get fees on a motion for
12 reconsideration, so. The case --

13 MR. DEXTER: We can address it.

14 THE COURT: -- I'm referring to, the Judge
15 Easterbrook decision, is Rickels vs. City of South Bend, 33
16 F.3d 785. Why don't we do this. If you want to respond,
17 file a response within seven days of tomorrow. And you can
18 file a reply within seven days of that. Okay?

19 All right. I don't have any other -- let me just
20 do something.

21 MR. DEXTER: And just so we're clear, the only
22 thing we're focusing on with respect to that case is I guess
23 the American rule and to what extent 37 --

24 THE COURT: It's a general question. You keep
25 saying the American rule, but it's the general question

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1 whether, under 37(a) the party that defeats a motion to
2 compel can recover the costs of an appeal from that motion.

3 I would think that this issue may have come up,
4 that there's more case law, the issue may have come up in
5 objections to a magistrate's recommendation regarding
6 discovery, which is really the kind of situation we're in
7 here, it's analogous. But as I said, Judge Easterbrook's
8 opinion, it did come up on appeal.

9 So tomorrow is the 23rd, so --

10 MR. DEXTER: Okay. Your Honor. And it's --

11 THE COURT: -- let me just make a note of that. I
12 looked, I couldn't find anything else, so I'll tell you.
13 But you guys have skin in the game, so maybe you'll do
14 better.

15 MR. DEXTER: And I just -- the other authority
16 I'll direct Your Honor's attention to is the Mantell case.

17 THE COURT: Which is Mantell?

18 MR. DEXTER: That's the --

19 THE COURT: Oh, that's the Second Circuit case
20 where the court invited a motion for reconsideration and
21 then sanctioned somebody for making the motion?

22 MR. DEXTER: He invited an opportunity to oppose a
23 fee application --

24 THE COURT: Or whatever it was.

25 MR. DEXTER: -- right?

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1 THE COURT: He invited a motion for
2 reconsideration and then sanctioned the person for making
3 the motion.

4 MR. DEXTER: Well, it's actually very similar to
5 this, because he told --

6 THE COURT: I -- go ahead.

7 MR. DEXTER: -- no, he told the party, file an
8 opposition to the fee request. Okay? Which is very similar
9 to what's happened here.

10 THE COURT: How is that?

11 MR. DEXTER: Because if you -- when you said that
12 they could file a motion for sanctions, right?

13 THE COURT: Right.

14 MR. DEXTER: That doesn't -- you were basically --
15 we're entitled to oppose that.

16 THE COURT: But that -- I understand you're
17 entitled to oppose it, but that's what the rule says. If
18 they win a motion to compel, they're entitled to file a
19 motion for sanctions.

20 MR. DEXTER: But in that case, there's the right
21 to a reply. The rule allowed a reply. So what happened in
22 that case --

23 THE COURT: No, wait, wait, wait, wait. Stop.

24 MR. DEXTER: Okay.

25 THE COURT: Stop. I tell them I'm affirming Judge

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1 Maas' order denying your motion to compel. I know you
2 disagree with me on that's what occurred here, but -- file
3 your motion -- file a separate motion, I think I said, under
4 Rule 37(a).

5 MR. DEXTER: Right. So you're effectively
6 inviting our opposition, otherwise we wouldn't have --

7 THE COURT: Well, no, you don't have to oppose it.

8 MR. DEXTER: And then you're just going to file a
9 fee request and we're not going to oppose it? I mean, do
10 you think we're -- no one's going to file an opposition?

11 THE COURT: It would be different if they were
12 arguing that I sanctioned them for filing the motion after I
13 told them to file it. If -- in other words, if you made an
14 argument that the motion was filed in bad faith, under Rule
15 9011 or 2819-27 or something like that, that would be
16 analogous. But I'm not -- they're not seeking the money
17 that you spent defending the motion, so what does that have
18 to do with anything?

19 MR. DEXTER: Well, I don't think --

20 THE COURT: Unless you want them to add that to
21 their bill.

22 MR. DEXTER: Generally, I think you -- generally
23 you are entitled to that, in a lot of context. In this
24 context you're actually not, and if -- I mean, that's not an
25 issue in the case, so we don't need to go there.

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1 THE COURT: Okay.

2 MR. DEXTER: But there are cases after the Baker
3 Botts case that say if you submit a fee application based on
4 winning fees under Rule 37 in bankruptcy court, you don't
5 get fees for preparing the application.

6 THE COURT: What cases say that, other than the
7 Ninth Circuit, which is not a bankruptcy case, but other
8 than the Ninth Circuit? If you win a motion to compel you
9 don't get fees for the appeal, these cases say?

10 MR. DEXTER: No. They say if you win the motion
11 to compel and then there's --

12 THE COURT: Why don't we do this to save some
13 time, in your response to this Rickel issue that I've
14 raised, just point me to any cases you want me to read. You
15 don't have tell me what they say.

16 MR. DEXTER: Okay.

17 THE COURT: Just anything you want me to read on
18 this issue.

19 MR. DEXTER: Okay. But this issue is not in the
20 case, and whether they get fees under --

21 THE COURT: Well, no, no, no, you're saying --
22 well, stop. You're saying that they are not entitled to
23 fees on appeal. Putting aside your substantially justified
24 argument, I don't understand you dispute that they're at
25 least entitled, under the rule, to the fees that were

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1 accrued before Judge Maas on the third motion to compel. Or
2 are you disputing that also?

3 MR. DEXTER: Well, we did raise, in our -- I think
4 there's a couple issues here. Really what I was just saying
5 is that there are cases after Baker Botts that say, if you
6 get -- if you're awarded fees on -- under 37(a) and then
7 there's a contest about those fees, then -- excuse me. Let
8 me say this again.

9 THE COURT: You're talking about --

10 MR. DEXTER: Let me say this.

11 THE COURT: -- you don't get fees for litigating
12 your entitlement to fees?

13 MR. DEXTER: That's right. If --

14 THE COURT: I understand.

15 MR. DEXTER: -- if you prevail on a 37.

16 THE COURT: I understand that.

17 MR. DEXTER: Okay. Because they said, in their
18 brief --

19 THE COURT: But you're not --

20 MR. DEXTER: -- you know --

21 THE COURT: -- okay, they're not -- stop, stop,
22 stop. That situation would arise if I agreed with them they
23 were entitled to fees, and then you filed an appeal from
24 that or a motion for reconsideration and they continued to
25 litigate their right to fees. That's not the situation

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1 here. They're litigating the fees they incurred on the
2 motion to compel, not on the motion -- not on the motion to
3 grant order -- on the order granting fees.

4 MR. DEXTER: No, I know, but -- and I -- look, we
5 don't have to put this in the case, because it's not in the
6 case, but all I'm pointing out is they've said in their
7 brief --

8 THE COURT: So why are you saying it?

9 MR. DEXTER: Because I thought we were having a
10 discussion about --

11 THE COURT: All right, let me ask you a question,
12 though.

13 MR. DEXTER: -- developments in the law.

14 THE COURT: Yeah, well, I'm familiar with Baker
15 and Botts. But let me ask you another question. On the
16 appeal, were you seeking fees incurred in connection with
17 the appeal, under 37(b)?

18 MR. DEXTER: I would have to review what our
19 papers -- I don't have that off the top of my head.

20 THE COURT: I'll tell you why I asked the
21 question, because the conclusion in your reply brief, it's
22 not in your moving brief, but in your reply brief you say,
23 "The Trustee should be compelled to share access to the
24 BLMIS database and to produce, to Defendants, all of the
25 trading records in the Queens warehouse." And then the next

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1 sentence says, "In addition, as a sanction, the Court should
2 be compelled to reimburse the Defendant's counsel for all
3 the legal fees they have incurred in trying to enforce this
4 Court's orders." Did that include the legal fees on the
5 appeal?

6 MR. DEXTER: I really don't know what the intent
7 of that was.

8 THE COURT: That's the way it sounds, you know?

9 MR. DEXTER: Well, if someone -- it's not judicial
10 estoppel unless the Court adopts the position --

11 THE COURT: No, it's not judicial estoppel, but
12 you're telling me that you asked for something you're not
13 entitled to.

14 MR. DEXTER: That's not how I read it, but quite
15 honestly, I don't -- you know.

16 THE COURT: All right. Well, you know, when you
17 come in here you got to be prepared. And maybe Ms. Chaitman
18 should have come in here to defend what happened here.

19 MR. DEXTER: Ms. Chaitman wanted to be here, but
20 she had a surgery a couple days ago, so she was --

21 THE COURT: Okay. Well, I certainly would have
22 postponed it to accommodate her.

23 MR. DEXTER: Okay.

24 THE COURT: All right. Let me -- is there any
25 response?

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1 MR. SHIFRIN: Your Honor, there's plenty I can
2 respond to there, I think the Court did a fantastic job
3 addressing all the issues I would have raised in response.
4 Unless the Court has anything you would like me to address
5 specifically?

6 THE COURT: You know, I've said on many occasions
7 that as a general matter trading records were relevant.

8 MR. SHIFRIN: We never disputed that, Your Honor.

9 THE COURT: And they were relevant on a variety of
10 grounds, whether or not there was a Ponzi Scheme, whether or
11 not -- and I don't think it was -- it's always -- it's been
12 no secret, although the opposition makes it sound like a
13 secret, that you know, the proprietary trading business was
14 using customer funds to purchase securities for the
15 proprietary trading business; it's right in paragraph 29 of
16 the Dubinsky report.

17 But, you know, the issue in this case has always
18 been whether those purchases were actually allocated to the
19 customers based on their customer statements. So why wasn't
20 it justified to ask for those trading records?

21 MR. SHIFRIN: Your Honor, the issue was never
22 should we produce the trading records. The issue was, what
23 should we do to identify additional trading records. That
24 was always the issue since this whole thing start. We never
25 disputed their relevance. There are hundreds of thousands

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1 of trading records in the e-data room one and have been in
2 there for ten years. We've made them available.

3 THE COURT: One of the things that was a little
4 unclear, and maybe you can clear this up, or point me to
5 something in the record, really, that clears it up. Is this
6 third-party discovery you got through 2004 examination, was
7 that in the e-data room?

8 MR. SHIFRIN: Yes.

9 THE COURT: Has it always been there?

10 MR. SHIFRIN: Yes. We made third-party financial
11 -- so let me step back. The e-data room one has three
12 primary folders, data, documents, and financials. The
13 financial folder, if you drill down on it, it's like an
14 Outlook mailbox, has subfolders that are organized by the
15 financial institutions that Ms. Chaitman was trying to get
16 the Trustee to use as search terms. And in there, by
17 account number, are over 100,000, I think it's 160,000
18 third-party financial records. It was exactly the type of
19 stuff she eventually asked for.

20 When this first started it was pre-92, DTC and NSC
21 trading records, as this Court has recognized the request as
22 evolved over time, but where we landed was third-party
23 records reflecting trading activity. Those records have
24 always been available. Now, I'm not saying every single one
25 was, but we made those available. And we made those

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1 available to support our affirmative case.

2 So the relevance of those records, again, was
3 never in dispute. What was in dispute is what efforts the
4 Trustee should take given the efforts that he already made
5 to identify further records and produce further records.

6 And let me just remind the Court that since Ms. Chaitman
7 filed her first motion, we produced hundreds of thousands of
8 additional documents in addition to everything in the data
9 room, and we restored over 200 reels of microfilm, which
10 initially Ms. Chaitman didn't ask for. We did that on our
11 own, after the first arbitration before Judge Maas. We
12 said, we're going to restore these microfilm reels in order
13 to find any additional pre-1992 DTC, NSC records, which is
14 what Ms. Chaitman was looking for at the time. And from
15 there it just devolved into something else.

16 And, you know, Mr. Dexter was talking about how
17 they were under the impression that there were two orders.
18 Well, it's hard for me to hear that to not get a little
19 frustrated, because the main order that governed this
20 dispute, they have ignored the entire time, and that's the
21 March 2017 order.

22 THE COURT: The protocol?

23 MR. SHIFRIN: I mean, their turning your comments,
24 this Court's comments into an order and then they're
25 ignoring the actual order. It's -- and I don't think any of

1 it is credible at all, Your Honor, frankly.

2 THE COURT: Okay. Thank you. I look forward to
3 hearing any comments you have on that one issue I raised
4 with the Rickel case.

5 MR. SHIFRIN: Thank you, Your Honor.

6 MR. DEXTER: Thank you, Your Honor.

7 THE COURT: And I'll reserve decision.

8 (Whereupon these proceedings were concluded at
9 2:42 PM)

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

6 **Sonya**
7 **Ledanski Hyde**

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